

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 321

BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO HIGHWAYS; PROVIDING LEGISLATIVE INTENT; AMENDING SECTION 40-114, IDAHO CODE, TO REVISE DEFINITIONS AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-202, IDAHO CODE, TO REVISE PROVISIONS RELATING TO A CERTAIN MAP, TO ESTABLISH PROVISIONS RELATING TO DESIGNATING A NEW HIGHWAY OR PUBLIC RIGHT-OF-WAY ON THE OFFICIAL MAP, TO ESTABLISH PROVISIONS RELATING TO NOTICE, TO ESTABLISH PROVISIONS RELATING TO THE PURPOSE OF AN OFFICIAL MAP AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-203, IDAHO CODE, TO ESTABLISH PROVISIONS RELATING TO A BURDEN OF PROOF, TO REMOVE LANGUAGE RELATING TO A HIGHWAY ABANDONED AND VACATED AND THAT PUBLIC USE OF A CERTAIN HIGHWAY OR PUBLIC RIGHT-OF-WAY MAY NOT BE RESTRICTED, TO ESTABLISH PROVISIONS RELATING TO CERTAIN PROCEEDINGS DETERMINING THE PUBLIC STATUS OR WIDTH OF A HIGHWAY OR PUBLIC RIGHT-OF-WAY, TO ESTABLISH PROVISIONS WHERE CERTAIN HIGHWAYS OR PUBLIC RIGHTS-OF-WAY MAY BE ABANDONED AND VACATED ONLY UPON A FORMAL DETERMINATION AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-208, IDAHO CODE, TO REVISE PROVISIONS RELATING TO JUDICIAL REVIEW, TO ESTABLISH PROVISIONS RELATING TO A PETITION AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-2312, IDAHO CODE, TO REVISE PROVISIONS RELATING TO WIDTH OF CERTAIN HIGHWAYS AND TO ESTABLISH PROVISIONS RELATING TO CERTAIN HIGHWAYS THAT AT THE TIME OF A VALIDATION OR JUDICIAL PROCEEDING ARE NOT LOCATED ON CERTAIN LANDS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. It is the intent of the Legislature to address right-of-way issues brought forward during the testimony and discussion before the Senate Transportation Committee in the 2012 legislative session relating to House Bill No. 628, as amended. During the 2012 interim session, the President Pro Tempore of the Senate and the Speaker of the House of Representatives established an Interim Task Force encompassing members of the Idaho Senate and the House of Representatives to further study these issues. On October 1, 2012, the Right-of-Way Task Force convened and accepted extensive testimony from stakeholders that included representatives of utility companies, counties and highway districts, irrigation districts and canal companies and various members of the public. It is further the intent of the Legislature to protect private property rights and ensure adequate public rights-of-way for transportation, utility and irrigation and other public facilities. It is the intent of the Legislature that this act shall apply to any and all existing and future highways and public rights-of-way and provide for an immediate implementation date due to the year delay in passing needed legislation, as a result of the yearlong task force efforts and the immediate need to provide clarity regarding the status or abandonment of highways and public rights-of-way.

SECTION 2. That Section 40-114, Idaho Code, be, and the same is hereby amended to read as follows:

40-114. DEFINITIONS -- M. (1) "Main traveled way" means the portion of a roadway for the movement of vehicles, exclusive of shoulders.

(2) "Maintain" or "place" means to allow to exist, subject to the provisions of chapter 19, title 40, Idaho Code.

(3) "Maintenance" means to preserve from failure or decline, or repair, refurbish, repaint or otherwise keep an existing highway or ~~structure~~ public right-of-way in a suitable state for use including, without limitation, snow removal, sweeping, litter control, weed abatement and placement or repair of public safety signage.

(4) "Mortgage" means a class of liens, including deeds of trust, as are commonly given to secure advances on, or the unpaid purchase price of, real property under the laws of the state of Idaho, together with the credit instruments, if any, secured by it.

SECTION 3. That Section 40-202, Idaho Code, be, and the same is hereby amended to read as follows:

40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS-OF-WAY. (1) The initial selection of the county highway system and highway district system may be accomplished in the following manner:

(a) The board of county or highway district commissioners shall cause a map to be prepared showing the general location of each highway and public right-of-way in ~~their~~ its jurisdiction, and the commissioners shall cause notice to be given of intention to adopt the map as the official map of that system, and shall specify the time and place at which all interested persons may be heard.

(b) After the hearing, the commissioners shall adopt the map, with any changes or revisions considered by them to be advisable in the public interest, as the official map of the respective highway system.

(2) If a county or highway district acquires an interest in real property for highway or public right-of-way purposes, the respective commissioners shall:

(a) Cause any order or resolution enacted, and deed or other document establishing an interest in the property for their highway system purposes to be recorded in the county records; or

(b) Cause the official map of the county or highway district system to be amended as affected by the acceptance of the highway or public right-of-way.

Provided, however, a county with highway jurisdiction or highway district may hold title to an interest in real property for public right-of-way purposes without incurring an obligation to construct or maintain a highway within the right-of-way until the county or highway district determines that the necessities of public travel justify opening a highway within the right-of-way. The lack of an opening shall not constitute an abandonment, and mere use by the public shall not constitute an opening of the public right-of-way.

(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways

1 used for a period of five (5) years, provided they shall have been worked and
 2 kept up at the expense of the public, or located and recorded by order of a
 3 board of commissioners, are highways. If a highway created in accordance
 4 with the provisions of this subsection is not opened as described in subsec-
 5 tion (2) of this section, there shall be no duty to maintain that highway,
 6 nor shall there be any liability for any injury or damage for failure to main-
 7 tain it or any highway signs, until the highway is designated as a part of the
 8 county or highway district system and opened to public travel as a highway.

9 (4) When a public right-of-way is created in accordance with the provi-
 10 sions of subsection (2) of this section, or section 40-203 or 40-203A, Idaho
 11 Code, there shall be no duty to maintain that public right-of-way, nor shall
 12 there be any liability for any injury or damage for failure to maintain it or
 13 any highway signs.

14 (5) Nothing in this section shall limit the power of any board of com-
 15 missioners to subsequently include or exclude any highway or public right-
 16 of-way from the county or highway district system.

17 (6) By July 1, 2005, and at least every five (5) years thereafter, the
 18 board of county or highway district commissioners shall ~~have~~ published in
 19 map form and ~~made~~ make readily available a map showing the general location
 20 of all highways and public rights-of-way under its jurisdiction. Any board
 21 of county or highway district commissioners may be granted an extension of
 22 time with approval of the legislature by adoption of a concurrent resolu-
 23 tion.

24 (7) Prior to designating a new highway or public right-of-way on the
 25 official map, the board of county or highway district commissioners shall
 26 confirm that no legal abandonment has occurred on the new highway or right-
 27 of-way to be added to the official map. In addition, the board of county or
 28 highway district commissioners shall have some basis indicating dedication,
 29 purchase, prescriptive use or other means for the creation of a highway and
 30 public right-of-way with evidentiary support.

31 (8) The board of county or highway district commissioners shall give
 32 advance notice of hearing, by U.S. mail, to any landowner upon or within
 33 whose land the highway or public right-of-way is located whenever a highway
 34 or public right-of-way is proposed for inclusion on such map and the pub-
 35 lic status of such highway or public right-of-way is not already a matter
 36 of public record. The purpose of this official map is to put the public on
 37 notice of those highways and public rights-of-way that the board of county
 38 or highway district commissioners considers to be public. The inclusion or
 39 exclusion of a highway or public right-of-way from such a map does not, in it-
 40 self, constitute a legal determination of the public status of such highway
 41 or public right-of-way. Any person may challenge, at any time, the inclusion
 42 or exclusion of a highway or public right-of-way from such map by initiating
 43 proceedings as described in section 40-208(7), Idaho Code.

44 (9) Nothing in this section or in any designation of the general loca-
 45 tion of a highway or public right-of-way shall authorize the public highway
 46 agency to assert or claim rights superior to or in conflict with any rights-
 47 of-way that resulted from the creation of a facility for the transmission of
 48 water which existed before the designation of the location of a highway or
 49 public right-of-way.

1 SECTION 4. That Section 40-203, Idaho Code, be, and the same is hereby
2 amended to read as follows:

3 40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYS-
4 TEM HIGHWAYS OR PUBLIC RIGHTS-OF-WAY. (1) A board of county or highway dis-
5 trict commissioners, whichever shall have jurisdiction of the highway sys-
6 tem, shall use the following procedure to abandon and vacate any highway or
7 public right-of-way in the county or highway district system including those
8 which furnish public access to state and federal public lands and waters:

9 (a) The commissioners may by resolution declare ~~its~~ their intention
10 to abandon and vacate any highway or public right-of-way ~~considered~~
11 ~~no longer to be,~~ or to reclassify a public highway as a public
12 right-of-way, where doing so is in the public interest.

13 (b) Any resident, or property holder, within a county or highway dis-
14 trict system including the state of Idaho, any of its subdivisions, or
15 any agency of the federal government may petition the respective com-
16 missioners for abandonment and vacation of any highway or public right-
17 of-way within their highway system. The petitioner shall pay a reason-
18 able fee as determined by the commissioners to cover the cost of the pro-
19 ceedings.

20 (c) The commissioners shall establish a hearing date or dates on the
21 proposed abandonment and vacation.

22 (d) The commissioners shall prepare a public notice stating their in-
23 tention to hold a public hearing to consider the proposed abandonment
24 and vacation of a highway or public right-of-way which shall be made
25 available to the public not later than thirty (30) days prior to any
26 hearing and mailed to any person requesting a copy not more than three
27 (3) working days after any such request.

28 (e) At least thirty (30) days prior to any hearing scheduled by the com-
29 missioners to consider abandonment and vacation of any highway or pub-
30 lic right-of-way, the commissioners shall mail notice by United States
31 mail to known owners and operators of an underground facility, as de-
32 fined in section 55-2202, Idaho Code, that lies within the highway or
33 public right-of-way.

34 (f) At least thirty (30) days prior to any hearing scheduled by the
35 commissioners to consider abandonment and vacation of any highway
36 or public right-of-way, the commissioners shall mail notice to own-
37 ers of record of land abutting the portion of the highway or public
38 right-of-way proposed to be abandoned and vacated at their addresses
39 as shown on the county assessor's tax rolls and shall publish notice of
40 the hearing at least two (2) times if in a weekly newspaper or three (3)
41 times if in a daily newspaper, the last notice to be published at least
42 five (5) days and not more than twenty-one (21) days before the hearing.

43 (g) At the hearing, the commissioners shall accept all information re-
44 lating to the proceedings. Any person, including the state of Idaho or
45 any of its subdivisions, or any agency of the federal government, may
46 appear and give testimony for or against abandonment.

47 (h) After completion of the proceedings and consideration of all re-
48 lated information, the commissioners shall decide whether the abandon-
49 ment and vacation of the highway or public right-of-way is in the public

1 interest of the highway jurisdiction affected by the abandonment or va-
 2 cation. The decision whether or not to abandon and vacate the highway or
 3 public right-of-way shall be written and shall be supported by findings
 4 of fact and conclusions of law.

5 (i) If the commissioners determine that a highway or public right-of-
 6 way parcel to be abandoned and vacated in accordance with the provisions
 7 of this section has a fair market value of twenty-five hundred dollars
 8 (\$2,500) or more, a charge may be imposed upon the acquiring entity,
 9 not in excess of the fair market value of the parcel, as a condition of
 10 the abandonment and vacation; provided, however, no such charge shall
 11 be imposed on the landowner who originally dedicated such parcel to
 12 the public for use as a highway or public right-of-way; and provided
 13 further, that if the highway or public right-of-way was originally a
 14 federal land right-of-way, said highway or public right-of-way shall
 15 revert to a federal land right-of-way.

16 (j) The commissioners shall cause any order or resolution to be
 17 recorded in the county records and the official map of the highway sys-
 18 tem to be amended as affected by the abandonment and vacation.

19 (k) From any such decision, a resident or property holder within the
 20 county or highway district system, including the state of Idaho or any
 21 of its subdivisions or any agency of the federal government, may appeal
 22 to the district court of the county in which the highway or public right-
 23 of-way is located pursuant to section 40-208, Idaho Code.

24 (2) No highway or public right-of-way or parts thereof shall be aban-
 25 doned and vacated so as to leave any real property adjoining the highway
 26 or public right-of-way without access to an established highway or public
 27 right-of-way. The burden of proof shall be on the impacted property owner to
 28 establish this fact.

29 (3) In the event of abandonment and vacation, rights-of-way or ease-
 30 ments ~~may shall~~ be reserved for the continued use of existing sewer, gas,
 31 water, or similar pipelines and appurtenances, or other underground facil-
 32 ities as defined in section 55-2202, Idaho Code, for ditches or canals and
 33 appurtenances, and for electric, telephone and similar lines and appurte-
 34 nances.

35 ~~(4) A highway abandoned and vacated under the provisions of this sec-~~
 36 ~~tion may be reclassified as a public right-of-way.~~

37 ~~(5) Until abandonment is authorized by the commissioners, public use of~~
 38 ~~the highway or public right-of-way may not be restricted or impeded by en-~~
 39 ~~croachment or installation of any obstruction restricting public use, or by~~
 40 ~~the installation of signs or notices that might tend to restrict or prohibit~~
 41 ~~public use. Any person violating the provisions of this subsection shall be~~
 42 ~~guilty of a misdemeanor.~~

43 ~~(6)~~ When a county or highway district desires the abandonment or vaca-
 44 tion of any highway, public street or public right-of-way which was accepted
 45 as part of a platted subdivision said abandonment or vacation shall be accom-
 46 plished pursuant to the provisions of chapter 13, title 50, Idaho Code.

47 (5) In any proceeding under this section or section 40-203A, Idaho
 48 Code, or in any judicial proceeding determining the public status or width of
 49 a highway or public right-of-way, a highway or public right-of-way shall be
 50 deemed abandoned if the evidence shows:

1 (a) That said highway or public right-of-way was created solely by a
 2 particular type of common law dedication, to wit, a dedication based
 3 upon a plat or other document that was not recorded in the official
 4 records of an Idaho county;

5 (b) That said highway or public right-of-way is not located on land
 6 owned by the United States or the state of Idaho nor on land entirely
 7 surrounded by land owned by the United States or the state of Idaho nor
 8 does it provide the only means of access to such public lands; and

9 (c) (i) That said highway or public right-of-way has not been used by
 10 the public and has not been maintained at the expense of the public
 11 in at least three (3) years during the previous fifteen (15) years;
 12 or
 13 (ii) Said highway or right-of-way was never constructed and at
 14 least twenty (20) years have elapsed since the common law dedica-
 15 tion.

16 All other highways or public rights-of-way may be abandoned and vacated
 17 only upon a formal determination by the commissioners pursuant to this sec-
 18 tion that retaining the highway or public right-of-way for use by the pub-
 19 lic is not in the public interest, and such other highways or public rights-
 20 of-way may be validated or judicially determined at any time notwithstanding
 21 any other provision of law. Provided that any abandonment under this subsec-
 22 tion shall be subject to and limited by the provisions of subsections (2) and
 23 (3) of this section.

24 SECTION 5. That Section 40-208, Idaho Code, be, and the same is hereby
 25 amended to read as follows:

26 40-208. JUDICIAL REVIEW. (1) Any resident or property holder within
 27 the county or highway district system, including the state of Idaho or any of
 28 its subdivisions, or any agency of the federal government, who is aggrieved
 29 by a final decision of a board of county or highway district commissioners in
 30 an abandonment and vacation or validation proceeding is entitled to judicial
 31 review under the provisions of this section.

32 (2) Proceedings for review are instituted by filing a petition in the
 33 district court of the county in which the commissioners have jurisdiction
 34 over the highway or public ~~right-of-way~~ right-of-way within twenty-eight
 35 (28) days after the filing of the final decision of the commissioners or, if
 36 a rehearing is requested, within twenty-eight (28) days after the decision
 37 thereon.

38 (3) The filing of the petition does not itself stay enforcement of the
 39 commissioners' decision. The reviewing court may order a stay upon appro-
 40 priate terms.

41 (4) Within thirty (30) days after the service of the petition, or within
 42 further time allowed by the court, the commissioners shall transmit to the
 43 reviewing court the original, or a certified copy, of the entire record of
 44 the proceeding under review. By stipulation of all parties to the review
 45 proceedings, the record may be shortened. A party unreasonably refusing to
 46 stipulate to limit the record may be ordered by the court to pay for addi-
 47 tional costs. The court may require subsequent corrections to the record and
 48 may also require or permit additions to the record.

1 (5) ~~If, before the date set for hearing, application is made to the~~
2 ~~court for leave to present additional information, and it is shown to the~~
3 ~~satisfaction of the court that the additional information is material and~~
4 ~~that there were good reasons for failure to present it in the proceeding~~
5 ~~before the commissioners, The parties may present additional evidence to~~
6 ~~the court, upon a showing to the court that such evidence is material to the~~
7 ~~issues presented to the court. In such case, the court may order that the~~
8 ~~additional information shall be presented to the commissioners upon condi-~~
9 ~~tions determined by the court. The commissioners may modify their findings~~
10 ~~and decisions by reason of the additional information and shall file that~~
11 ~~information and any modifications, new findings, or decisions with the re-~~
12 ~~viewing court.~~

13 (6) ~~The review shall be conducted by the court without a jury and shall~~
14 ~~be confined to the record. The court shall consider the record before the~~
15 ~~board of county or highway district commissioners and shall defer to the~~
16 ~~board of county or highway district commissioners on matters in which such~~
17 ~~board has appropriately exercised its discretion with respect to the evalu-~~
18 ~~ation of the public interest. As to the determination of highway or public~~
19 ~~right-of-way creation, width and abandonment, the court may accept new ev-~~
20 ~~idence and testimony supplemental to the record provided by the county or~~
21 ~~highway district, and the court shall consider those issues anew. In cases~~
22 ~~of alleged irregularities in procedure before the commissioners, not shown~~
23 ~~in the record, proof thereon may be taken in the court. The court, upon re-~~
24 ~~quest, shall hear oral argument and receive written briefs.~~

25 (7) ~~The court shall not substitute its judgment for that of the com-~~
26 ~~missioners as to the weight of the information on questions of fact. The~~
27 ~~court may affirm the decision of the commissioners or remand the case for~~
28 ~~further proceedings. The court may reverse or modify the decision if sub-~~
29 ~~stantial rights of the appellant have been prejudiced because the commis-~~
30 ~~sioners' findings, inferences, conclusions or decisions are:~~

- 31 ~~(a) In violation of constitutional or statutory provisions;~~
- 32 ~~(b) In excess of the statutory authority of the commissioners;~~
- 33 ~~(c) Made upon unlawful procedure;~~
- 34 ~~(d) Affected by other error of law;~~
- 35 ~~(e) Clearly erroneous in view of the reliable, probative and substan-~~
- 36 ~~tial information on the whole record; or~~
- 37 ~~(f) Arbitrary or capricious or characterized by abuse of discretion or~~
- 38 ~~clearly unwarranted exercise of discretion~~

39 Any person other than a board of county or highway district commission-
40 ers seeking a determination of the legal status or the width of a highway or
41 public right-of-way shall first petition for the initiation of validation or
42 abandonment proceedings, or both, as provided for in sections 40-203(1) (b)
43 and 40-203A(1), Idaho Code. If the commissioners having jurisdiction over
44 the highway system do not initiate a proceeding in response to such a peti-
45 tion within thirty (30) days, the person may seek a determination by quiet
46 title or other available judicial means. When the legal status or width of
47 a highway or public right-of-way is disputed and where a board of county
48 or highway district commissioners wishes to determine the legal status or
49 width of a highway or public right-of-way, the commissioners shall initiate
50 validation or abandonment proceedings, or both, as provided for in sec-

tions 40-203 and 40-203A, Idaho Code, rather than initiating an action for quiet title. If proceedings pursuant to the provisions of section 40-203 or 40-203A, Idaho Code, are initiated, those proceedings and any appeal or remand therefrom shall provide the exclusive basis for determining the status and width of the highway, and no court shall have jurisdiction to determine the status or width of said highway except by way of judicial review provided for in this section. Provided that nothing in this subsection shall preclude determination of the legal status or width of a public road in the course of an eminent domain proceeding, as provided for in chapter 7, title 7, Idaho Code.

SECTION 6. That Section 40-2312, Idaho Code, be, and the same is hereby amended to read as follows:

40-2312. WIDTH OF HIGHWAYS. (1) Where the width of a highway is stated in the plat, dedication, deed, easement, agreement, official road book, determination or other document or by an oral agreement supported by clear and convincing evidence that effectively conveys, creates, recognizes or modifies the highway or establishes the width, that width shall control.

(2) Where no width is established as provided for in subsection (1) of this section and where subsection (3) of this section is not applicable, such ~~All~~ highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, ~~except those of a lesser width presently existing, and may be as wide as required for proper construction and maintenance in the discretion of the authority in charge of the construction and maintenance. Bridges located outside incorporated cities shall be the same width to and across the river, creek or stream as the highway leading to it.~~

(3) Highways that at the time of a validation or judicial proceeding are not located on land owned by the United States or the state of Idaho or on land entirely surrounded by land owned by the United States or the state of Idaho, and that have not received maintenance at the expense of the public in at least three (3) years during the previous fifteen (15) years, shall be declared to be of such width, and none greater, as is sufficient to accommodate:

(a) The existing physical road surface;

(b) Existing uses of the highway;

(c) Existing features included within the definition of highways in section 40-109(5), Idaho Code;

(d) Such space for existing utilities as has historically been required for ongoing maintenance, replacement and upgrade of such utilities; and

(e) Space reasonably required for maintenance, motorist and pedestrian safety, necessary to maintain existing uses of the highway.

(4) Nothing in this section shall diminish or otherwise limit the authority and rights of irrigation districts, canal companies or other such entities as provided in chapters 11 and 12, title 42, Idaho Code.

(5) Nothing in this section shall diminish or otherwise limit any right of eminent domain as set forth in chapter 7, title 7, Idaho Code.

SECTION 7. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.